NOTES

The National Guard Call—Its Effect on State Civil Officers Holding Commissions

One writer in the military-legal field recently observed that the status of persons in the military reserves of the United States as "Officers of the United States" was likely to be challenged in the light of state constitutions and laws rather than in the federal courts.[1] Recent events bear him out. It is the purpose of this comment to examine the possible clash of interests when state officials holding commissions in the "National Guard" are ordered into active service under the emergency legislation of the past year.[2] Specifically, will the latter undertaking constitute an official function so inconsistent or incompatible with their civil offices as to render them vacated by force of law?

At common law there was no limit to the number of offices which a person might hold simultaneously, provided that no two of them were "incompatible".[3] The latter result was said to obtain "where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one person to retain both".[4] Strangely enough, this did not in all cases prevent dual office holding where it was physically impossible, due to lack of time or the distance between the offices, for the incumbent to *perform* the duties of both.[5] What then did render offices "incompatible"? While the determination of that is certainly a judicial question,[6] even a careful reading of the cases fails to clarify the situation. The jejune statement that there must be found an "inconsistency in the *functions* of the offices",[7] was the usual expression of the rule. This embodied the idea that the duties of both could not be impartially and harmoniously performed because of the nature of the offices themselves, and not because physical limitations might impede the performance of the duties of the offices. A clear illustration of inconsistent functions would be, for example, an office carrying a duty to submit an account held by an officer whose duty in another capacity was to audit that account, or a judge who might hold the position of clerk of his own court.[8] Despite the great antiquity of the doctrine, a workable definition has never been formulated.[9] But its very age and constant recurrence in the cases brands it a basic principle of representative government.[10] Its thesis has been incorporated into the law of nearly all our states.

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1. Colby, *The Legal Status of Members of the Officer's Reserve Corps* (1937) 21 MINN. L. REV. 162, 180.

2. 54 STAT. —, 50 U. S. C. A. § 401 (Supp. 1940), authorizing the President from time to time during the period ending June 30, 1942, to order into active service for a period of twelve consecutive months each, any or all members and units of any oral reserve components of the Army of the United States. See also, *The National Guard Resolution*, (1940) 9 INT. JURID. ASSOC. BULL. 25.

3. MECHEM, THE LAW OF PUBLIC OFFICES AND OFFICERS (1890) § 420 *et seq.* For another treatise covering the same material, see THROOP, THE LAW RELATING TO PUBLIC OFFICERS (1892) § 30. See also, Badeau v. United States, 130 U. S. 439 (1889); Converse v. United States, 62 U. S. 463 (1858).

4. MECHEM, *op. cit. supra* note 3, § 422.

5. *Ibid*, and especially n. 2 there. Bryan v. Cattell, 15 Iowa 538 (1864).

6. *See* People *ex rel.* Ryan v. Green, 58 N. Y. 295, 304 (1878).

7. Kenney v. Georgen, 36 Minn. 190, 31 N. W. 210 (1886); Note (1935) 10 ST. JOHN'S L. REV. 83.

8. People *ex rel.* Ryan v. Green, 58 N. Y. 295, 304 (1874).

9. See Howard v. Harrington, 114 Me. 443, 446, 96 Atl. 769, 770 (1916), where the court sets forth various attempts which have been made to resolve the much debated question "what is incompatibility?" into brief definitions.

10. Millard v. Thatcher, 2 T. R. 81, 100 Eng. Rep. R. 45 (1787).

Existing alongside the common law restriction is a multitude of constitutional and statutory prohibitions aimed at "dual office holding". They may be incorporated in the state constitution,[11] or stand as legislative supplements to constitutional direction.[12] Absent any limitation in the constitution the legislatures have inherent power to enact this type of limitation.[13] By far the great majority of these state plainly and simply that the "holding" of two or more offices at the same time, be they both state or one state and one federal, is prohibited. Despite the apparent clarity of these restrictions the influence of the common law rationale, that there must be found an inconsistency in the functions of the offices, has permeated to the extent that we find cases failing to apply these limitations as absolute curbs on occupying governmental positions in the plural.[14] For the most part the courts have given a much broader application to these constitutional and statutory prohibitions than the common law gave to the doctrine of incompatibility. Some provisions have given the courts little trouble, for they specifically classify certain offices as incompatible per se.[15] It seems clear that the policy of the law has advanced steadily toward more rigorous restrictions on multiple public salaries and attempts to serve "two masters".

In any event, where the simultaneous holding of offices under either type of restriction is found to be unwarranted, it is an incident of the acceptance of the second that the former is vacated.[16]

On the whole, only a study of the widely different fact situations adjudicated will lead to an intelligent understanding of any particular type of conflict between the "functions" or "holding" of offices. To do this successfully, since our judicial process invariably compares the precedents as guides to decision, we must first know the functions of the National Guard officer today and how they differ from those extant when a similar problem faced courts in the past. A brief account of the evolution of the Guard to its present day status will clarify this, and also help to determine the proper "public policy considerations" which should be taken into account in deciding the issue.

The framers of the Constitution of the United States, recognizing that contingencies calling for the use of a trained militia might face the national government, but desiring to effect a strong element of state control of the militia, prescribed that: Congress shall have the power,

> "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.
>
> "To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." [17]

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11. See note 45 *infra.*

12. De Turk v. Commonwealth, 129 Pa. 151 (1889).

13. People *ex rel.* Furman v. Clute, 12 N. Y. Prac. (N. S.) 399 (Abbott, 1872).

14. United States v. Brindle, 110 U. S. 688 (1884). As the Supreme Court has pointed out, a federal act prohibiting an officer from receiving more than one salary, cannot by "fair interpretation be held to embrace an employment which has no affinity or connection, either in its character or by law or usage, with the line of his official duty, and when the service to be performed is of a different character and for a different place, and the amount of compensation regulated by law." Converse v. United States, 62 U. S. 463, 471 (1858).

15. See, for example, State v. Clark, 21 Nev. 333, 31 Pac. 545 (1892).

16. Fekete v. City of East St. Louis, 315 Ill. 58, 145 N. E. 692 (1924); Stubbs v. Lee, 64 Me. 195 (1874).

17. U. S. CONST., Art. I, § 8, cls. 15, 16.

Over one hundred years later, Congress, acting under the impetus of the misadventures of Army organization during the Spanish-American War, first saw fit to organize the militia, under the Dick Act,[18] into the National Guard.[19] Through it came the first major attempt to have the militia conform to regular army organization. However, no provisions were made to force the States to comply with the plan. It was simply an offer of federal cooperation in financing, organizing, and training the 48 separate armies of the several states, the latter retaining complete autonomy in relation to matters of compliance and approval of the federal aid proffered.[20] Even the questioned changes attempted by the Act of 1908 providing that the Organized Militia, when called, should be available for service "either within or without the territory of the United States" [21] made no attempt to cure the underlying defect in the power to use the militia for purposes national in scope. It was not until the pressure of international politics in Europe forced the passage of the National Defense Act of 1916 [22] that the National Guard was, to use the term then current, "federalized". The difficulties entailed in promoting this scheme of federalization are best illustrated by the fact that many believed the militia too restricted in use by the Constitutional provisions mentioned above, and therefore to be disregarded in favor of a new federal force to be known as the Continental Army.[23] However, the more weighty opinion proved to be that backed by Secretary Stimson and President Wilson, which held that the militia question could best be settled by broadening the scope of federal control over the Guard. This was justified by the feeling that the framers undoubtedly intended the militia to be used as an instrument of national force in any serious emergency. Necessity deemed the federalization of the Guard the most expedient and efficacious solution.[24] Henceforth, under this National Defense Act, the states, for all practical purposes, were compelled to conform to the offer of federal aid.[25] And only under the provisions of federal statute [26] and Presidential direction [27] could they maintain troops at all. The nearly complete autonomy which the states had formerly had in these matters was dead. Qualifications [28] and elimina-

18. 32 STAT. 775 (1903).

19. For a full discussion tracing the historical development of the use of the militia, and these clauses, see Weiner, *The Militia Clause of the Constitution* (1940) 54 HARV. L. REV. 181.

20. See Section 20 of the Act (32 STAT. 779), for example, making the assignments of Army officers to duty in training the militia subject to revocation at the request of the state Governors.

21. 35 STAT. 400, 32 U. S. C. A. § 81b (Supp. 1940). Attorney General Wickersham held that the militia clause of the Constitution did not allow the use of militia for military purposes outside the United States. 29 OPS. ATT'Y GEN. 322 (1912). See also, Ansell, *Status of State Militia under the Hay Bill* (1917) 30 HARV. L. REV. 712.

22. 39 STAT. 166 (1916).

23. "Secretary Garrison embraced the first view; he was of the opinion that the militia must be disregarded, and that a new federal force, to be known as the Continental Army, should be our chief reliance in time of stress. When President Wilson refused to support him on this issue, Mr. Garrison resigned." Weiner, note 19 *supra*, at 199.

24. Note too that the National Defense Act also reorganized the Regular Army and created the Officer's Reserve Corps. With these aspects of the act we have no concern here.

25. Failure or refusal to comply with the act debarred such state from "any pecuniary or other aid, benefit, or privilege authorized or provided by this Act *or any other law.*" (Ital. supp.) 39 STAT. 212 § 116 (1916).

26. 39 STAT. 198 § 61 (1916).

27. 39 STAT. 213 § 118 (1916).

28. 39 STAT. 201 § 74 (1916).

tions [29] of National Guard officers were matters for federal authority. The new oath pledged obeisance to either Presidential or Gubernatorial order.[30] But most important for our purposes, when Congress might authorize the use of troops in excess of the Regular Army, the President could draft into service all members of the National Guard.[31] During the World War, all officers of the Guard so drafted, not above the rank of colonel, were appointed officers in the United States Army in the grades in which they held commissions in the Guard.[32] Unfortunately, such use of the draft was ipso facto a discharge from the militia.[33] Consequently, when the World War was over and the troops mustered out of service, there was no more National Guard.[34] To prevent a recurrence of this mistake, the Army Reorganization Act of 1920, recognizing that an organized militia is indispensible in coping with ordinary peacetime emergencies within the states, amended this provision to read that Guardsmen who should be drafted, after discharge "shall resume their membership in the militia, and, if the State so provide, shall continue to serve in the National Guard . . .".[35] Even at this late date, however, although National Guard officers were made eligible for Reserve commissions,[36] the National Guard itself was not "federalized" to the extent of being an integral part of the Army. Only when and if it were called into service would it be considered as such.[37] To this extent, at least, local autonomy in militia matters was formally retained.

In the cataclysmic legislation of the early days of the present administration came the final step in the evolution of the Guard to a status as a component of the Regular Army. Congress acted to create "The National Guard of the United States". It consisted of all federally recognized National Guard units; as a practical matter the whole of the Guard. "It shall be *a reserve component of the Army of the United States . . . Provided,* That the members of the National Guard of the United States shall not be in the active service of the United States except when ordered thereto in accordance with law, and, in time of peace, they shall be administered, armed, uniformed, equipped, and trained in their status as the National Guard of the several States . . . ." [38] Never again would a draft of the Guardsmen as individuals be necessary. When a national emergency should move Congress to so authorize, the President was to "*order* into the active military service . . . any or all units and members of the National Guard of the United States." [39] And on the termination

29. 39 STAT. 202 § 77 (1916). See also 48 STAT. 159, 32 U. S. C. A. § 115 (Supp. 1940) for the power of the Federal Government in this respect today.

30. 39 STAT. 201 §§ 70, 73 (1916).

31. 39 STAT. 211 § 111 (1916).

32. Fekete v. City of East St. Louis, 315 Ill. 58, 60, 145 N. E. 692, 693 (1924).

33. Ex parte Dostal, 243 Fed. 664, 674 (N. D. Ohio, 1917).

34. Weiner, note 19 *supra,* at 205.

35. 41 STAT. 784, 32 U. S. C. A. § 81 (1934). Under later amendments this same result obtains although on a different theory as will be explained in the text. The law now provides, "Upon being relieved from active duty in the military service of the United States all individuals and units shall thereupon revert to their National Guard status." 48 STAT. 160, U. S. C. A. § 81 (Supp. 1940).

36. 41 STAT. 775, 10 U. S. C. A. § 353 (1927). It was felt that the National Guard officers affected by a possible draft would serve under these commissions in the Regular Army.

37. "The Army of the United States shall consist of the Regular Army, the National Guard *while in the service of the United States,* and the Organized Reserves, including the Officer's Reserve Corps and the Enlisted Reserve Corps." 41 STAT. 759, 10 U. S. C. A. (1927) § 2. (Ital. supp.) See also Colby, *The Status of the National Guard* (1925) 98 CENT. L. J. 240.

38. 48 STAT. 155, 156, 32 U. S. C. A. § 4a (Supp. 1940). (Ital. supp.)

39. 49 STAT. 392, 32 U. S. C. A. § 81 (Supp. 1940) (Ital. supp.)

of such emergency the various units were to automatically remain intact after discharge, as part of the National Guard of the several states.[40] Hence, when the Guard as now constituted is ordered into active service, it is free of the restrictions of the militia clause, for as part of the Regular Army, the power to administer it stems, properly, from the army clause. Thus, the individual member of the Guard today has a dual capacity, he is primarily a reservist, then a militiaman.

On August 28, 1940, the President signed the National Guard Resolution. As adopted it authorizes ordering into active military service from time to time for a period of one year each, members of the reserve components of the Army of the United States, with or without their consent, to serve only within the Western Hemisphere and the territories and possessions of the United States.[41] Already, executive orders issuing under this authority have raised the problem with which we are here concerned in the highest court of two jurisdictions.[42]

It must be noted first that there is ample authority to the effect that military and civil offices may be antithetical in their *functions,*[43] as well as for the fact that they may come within the limitations on the *holding,* as it is commonly phrased, dual offices of "honor, trust or profit".[44] To this effect, the World War cases, involving commissioned officers of the National Guard taken into service under the draft device, uniformly held such persons to have vacated any civil office held in their respective states.[45] No other result was seemingly possible in view of the fact that under the draft, then used to induct the Guard into active service, the officers affected were *relieved* of their militia status, after which they were granted corresponding commissions in the Regular Army.[46]

Interestingly enough, in one of the best considered of those opinions, the court digressed to criticize the common law theory of incompatibility as unsound, indicating that it would test incompatibility, absent a controlling constitutional or statutory prohibition of dual office holding, solely on the basis of the ability of the person involved to *perform* the duties required by each office.[47] This same feeling has been expressed by other courts dealing with the problem. One English judge stated as early as 1829, "I think that the two offices are incompatible where the holder cannot in every instance discharge the duties of each." [48] Unfortunately, this thought has been denied development due to the fact that nearly all our present day cases arise under specific statutory or constitutional provisions, as was the case with the World War cases involving National Guard

40. See note 35 *supra.*

41. 54 STAT. —, 50 U. S. C. A. § 401 (Supp. 1940). See note 66 *infra.* See also *The National Guard Resolution* (1940) 9 INT. JURID. ASSOC. BULL. 25.

42. Kennedy v. Cook, 146 S. W. (2d) 56 (Ky. 1940); Carpenter v. Sheppard, 145 S. W. (2d) 562 (Texas 1940).

43. Winchell v. United States, 28 Ct. Cl. 30 (1892); Ballf v. Krauz, 82 F. (2d) 315 (C. C. A. 9th, 1936); Tatlor v. Commonwealth, 3 Marsh. 401 (Ky. 1830). *Contra:* Bryan v. Cattell, 15 Iowa 538 (1864); State *ex rel.* Tzschuck v. Weston, 4 Neb. 234 (1876).

44. Chisholm v. Coleman, 43 Ala. 204 (1896); Kerr v. Jones, 19 Ind. 351 (1862); State *ex rel.* McMillan v. Sadler, 25 Nev. 131, 58 Pac. 284 (1899), *modified per curiam,* 25 Nev. 193, 59 Pac. 546 (1900), 25 Nev. 196, 63 Pac. 128 (1900). See also 28 OPS. ATT'Y GEN. 298 (1912).

45. Fekete v. City of East St. Louis, 315 Ill. 58, 145 N. E. 692 (1924); Lowe v. State, 83 Tex. Crim. Rep. 134, 201 S. W. 986 (1918).

46. See note 32 *supra.*

47. Fekete v. City of East St. Louis, 315 Ill. 58, 61, 145 N. E. 692, 694 (1924).

48. Bayley, J., in Rex v. Tizzard, 9 B. & C. 418, 422, 109 Eng. Rep. R. 155, 157 (1829).

officers.[49] While these latter provisions may differ slightly in manner of expression, the general tenor of all is included in the most common expression denying contemporaneous holding of any office of "honor, trust or profit".[50] So the pull of policy considerations behind these expressions of sentiment would, in any instance, seem to dictate restrictions where the officer involved was unable to carry out his duties to the public.

Recently both Kentucky [51] and Texas [52] have ruled that commissioned officers in the National Guard of the United States who are ordered into active service by the President do *not* thereby become holders of an office either inconsistent under the general broad constitutional limitations, or incompatible [53] with the civil offices which they held in those states. In both cases the civil offices were of no small importance. The Texas case involved the Chairman of the Texas Unemployment Compensation Commission, and the Kentucky officer was a circuit clerk of courts. Both offices obviously call for competent and experienced executives. Why, then, the unanimity in the decisions that neither man be held to have vacated his civil office?

It would seem, first of all, that the tremendous change in the status of the National Guard officer in the last twenty years leaves the World War cases with no guiding or binding authority. Secondly, in the Texas case the officer was detailed to duty in a place where he was able to carry out the duties of his civil office at the same time. The court stressed this fact, stating, "We do not have before us a case where an office has been neglected and the business of the public unattended to; but, on the contrary, this record shows that the duties of that office are being performed and that the administration of its affairs is being carried on." [54] But in the Kentucky case no such mitigating circumstance appears. Both cases were of the opinion that the men did not become officers of the United States, but retained their status as officers in the National Guard of their respective states.[55] It seems to the writer that one need not become an "officer of the United States" in the strict sense of the term [56] to come within a broad prohibition, based on public policy considerations, against holding an "office of trust or profit" thereunder. But the feeling of both the instant courts was clear that if the persons concerned did not become commissioned officers in the Army, as was the case of the men called from

49. See note 44 *supra*.

50. *E. g.*, ILL. CONST., Art. 4, § 3; KY. CONST. § 237; PA. CONST., Art. XII, § 2; TEXAS CONST., Art. XVI, § 12.

51. Kennedy v. Cook, 146 S. W. (2d) 56 (Ky. 1940). This was a declaratory judgment action to determine the petitioner's right to hold his civil office as a circuit clerk, after being ordered into active service as a commissioned officer in the National Guard of the United States.

52. Carpenter v. Sheppard, 145 S. W. (2d) 562 (Texas 1940). This was a mandamus proceeding to force the payment of salary accruing to petitioner's office as the Chairman and Director of the Texas Unemployment Compensation Commission, after petitioner was ordered into active service with the National Guard of the United States.

53. Kennedy v. Cook, 146 S. W. (2d) 56, 58 (Ky. 1940).

54. "Furthermore, this record does not show that Relator has neglected to perform the duties of his office, or that he will do so in the future." Carpenter v. Sheppard, 145 S. W. (2d) 562, 566, 567 (Texas 1940).

55. "Wherever Relator goes under such call, he still will be, so far as Texas is concerned, an officer in its National Guard." Carpenter v. Sheppard, 145 S. W. (2d) 562, 566 (Texas 1940); "Cook will still be a captain in his unit (Coast Artillery AA) and will still hold and act under the commission issued to him by the Governor of this Commonwealth." Kennedy v. Cook, 146 S. W. (2d) 56, 58 (Ky. 1940).

56. See United States v. Mouat, 124 U. S. 303 (1887); United States v. Germaine, 99 U. S. 508 (1878).

the Guard during the World War, then there was no bar to the retention of their state civil positions. The arguments on this point are further weakened by the implications of these two statutory provisions: (1) "All persons so ordered into the active military service of the United States shall from the date of such order *stand relieved* from duty in the National Guard of their respective states . . ."; [57] and in relation to the termination of such service, (2) "Upon being relieved from active duty in the military service of the United States all individuals and units shall thereupon revert *to their National Guard status.*" [58]

It seems apparent from this that the militia status of the officers is suspended for the duration of active service and that they become an integral part of the Army subservient to its needs alone. And this, despite the fact that the units of the Guard are to be kept intact so far as is practicable.[59]

The Kentucky case ventures the interesting argument that the present call is simply an extension of the Guard's normal fifteen day training period per year,[60] and to be considered for this purpose on that basis. Two factors weigh against this. Before the 1940 legislation, the training period was limited to fifteen days "except in time of a national emergency expressly declared by Congress".[61] Congress declined to assume the responsibility of declaring the existence of a national emergency. Opinions in the legislature were to the effect that the legislation contemplated that emergency conditions were imminent,[62] but the fact was never expressed by statute. Rather than so declare, Congress chose to abrogate the above provision, under which the men had taken service in the Guard, and simply provide that the President might order the Guard into active service whenever Congress authorized the use of troops in excess of the Regular Army.[63] This tack was severely criticized on the floor of the House,[64] but in view of the fact that the 1933 legislation was based on the Army clause and not the Militia clauses of the Constitution, the action of Congress may be legally justified. The second factor weighing against the "extension of training period" argument, is again the inference to be drawn from the statutes quoted above relieving the men of their duty in the National Guard of their respective states during the period of active service.

A fact that would seem to clinch the argument that the civil offices should be held to have been vacated in both these cases is that the National Guard Resolution of 1940 assumes so in specific language. In the Act, Congress has stated that "In the case of any such person who, in order to perform such active duty or such service, has left or leaves a position, other than a temporary position, . . . if such position was in the employ of any State or political subdivision thereof it is hereby declared to be the sense of the Congress that such person should be *restored* to such position or to

57. 49 STAT. 392, 32 U. S. C. A. § 81 (Supp. 1940).
58. *Ibid.*
59. *Ibid.*
60. Kennedy v. Cook, 146 S. W. (2d) 56, 58 (Ky. 1940).
61. "Except in time of a national emergency expressly declared by Congress, no officer of the National Guard of the United States shall be employed on active duty for more than fifteen days in any calendar year without his own consent." 49 STAT. 391, 32 U. S. C. A. § 81 (c) (Supp. 1940).
62. 86 Cong. Rec., Aug. 14, 1940, at 15835, 15819.
63. 54 STAT. —, 50 U. S. C. A. § 301 (c) (Supp. 1940).
64. "In my opinion we do a grave wrong when we pass legislation of this kind. I think the most sacred contract any government can enter into is the one which it makes between itself and the men who shoulder the responsibility of protecting our Nation in time of war. . . . To do what is proposed in this bill certainly will not engender confidence in government." Remarks of Congressman Smith of Ohio, 86 Cong. Rec., Aug. 14, 1940, at 15835.

a position of like seniority, status and pay." Neither court mentioned the provision.[65]

On the other hand, these men have been called without their consent,[66] and will normally leave elective or appointive offices which, if held to have been vacated will be more difficult to regain than positions in the business world from which the ordinary citizen is drafted. Moreover, action taken recently in two related fields seems to justify the instant courts. First, the Attorney General advised that an active duty call for members of the Officer's Reserve Corps created no inconsistency or incompatibility with civil offices held at the same time.[67] Secondly, the American Bar Association's Committee on Professional Ethics and Grievances recently approved of the simultaneous holding of judicial office and commissions in the National Guard.[68] This did not, of course, apply to officers on active duty. It would still seem to be the opinion of this group that active service would conflict with the holding of judicial office. But this change from the former strict rule which prohibited membership in the Guard indicates that strong tendencies are present to favor interest and activity in military service.

Public policy considerations, which in the last analysis dictate the results in these cases, are heavily weighted in normal times in the direction of protecting the taxpayer and general public by ousting state officials called away from their duties for perhaps two years time.[69] In addition there is the strong implication in the words of the Act which relieves the men of their duty in the National Guard of their respective states during the period of call, that they are become officers of the United States. Despite all this, the instant holdings have an element of fairness about them. In the first place, the lack of any consensual element in the acceptance of the service, coupled with the hardship to be expected in regaining an elective or appointive office vacated, may furnish the controlling policy. Lastly, it may still be safely asserted that in general our military policy is based on the concept of maintaining a trained group of "civilian officers", hence their primary functions in their civil capacities must receive first consideration and paramount protection. Patently, the instant courts have had some such feeling in making their findings. Otherwise the inescapable logic of statutory construction would dictate contrary results. Obviously civil functions cannot be properly fulfilled by officers on active duty.

In any event, the several legislatures should act to adjust the salaries of men ordered into service, to correspond with any failure in the performance of duties owed the public.[70] *R. J. F.*

65. Pub. Res. No. 96, 76th Congress. S. J. Res. No 286. Approved, Aug. 27, 1940 (Ital. supp.).

66. "During the period ending June 30, 1942, the President is hereby authorized from time to time to order into the active military service of the United States for a period of twelve consecutive months each, any or all members and units of any oral reserve components of the Army of the United States (except that any person in the National Guard of the United States under the age of 18 years so ordered into the active military service shall immediately be issued an honorable discharge from the National Guard of the United States), and retired personnel of the Regular Army, *with or without their consent*, to such extent and in such manner as he may deem necessary for the strengthening of the national defense." 54 STAT. —, 50 U. S. C. A. § 401 (Supp. 1940) (Ital. supp.).

67. 39 OPS. ATT'Y GEN. 53 (1938); Note (1939) 7 GEO. WASH. L. REV. 886.

68. Phila. Legal Intelligencer, April 1, 1941, p. 1, col. 1.

69. Note that the authorization to the President allows an order into active service during the period ending June 30, 1942, *from time to time* for periods of twelve months each. 54 STAT. —, 50 U. S. C. A. § 401 (Supp. 1940).

70. Such legislation was commonly attempted during the World War. See, for example, Officers and Employees in Military Service, PA. STAT. ANN. (Purdon, 1930) tit. 65 §§ 111, 112, 113. The legislature here provided for substitutes, and salary payments to dependents of men who enlisted, enrolled, or were drafted into service.

The Effect of Bankrupcty on Estates by Entireties

I. Present Nature of Estates by Entireties

Variety in the rates of progress of states in the modernization of real property laws prevents generalization as to the present characteristics of what are generally known as common-law estates. Estates by entireties, for instance, have been abolished in some states,[1] modified by the married women's acts in others,[2] although in the majority they still retain their significant features. Thus it may be said that if an estate in fee be given man and wife, they will hold as tenants by the entirety in a number of jurisdictions, each owning an indivisible share in the whole estate,[3] even though the marital unity doctrine upon which the estate is based has been remodeled by modern judicial concepts of the relationship of husband and wife.[4] In jurisdictions recognizing this estate, the important element of the right of survivorship in either spouse has been retained and the estate's immunity to the demands of creditors of a single spouse has been established by statute. Some of the more interesting problems involving these incidents have arisen since the advent of bankruptcy legislation.

II. Title of the Trustee to Estates by Entireties

The first question confronting the bankruptcy courts was whether a tenancy by entireties should be included among the assets of a bankrupt spouse. Aside from the provisions of the Bankruptcy Act, it would seem that the spouse's interest in such an estate might easily be termed an "asset". While the spouses live, both have a definite estate in the land, as distinguished from an expectancy.[5] Furthermore, a right of survivorship is attached to the estate which might prove very valuable in the event of the death of the other spouse close to the time bankruptcy proceedings take place.[6] But the title of the trustee to the bankrupt's property is governed by the Bankruptcy Act, specifically section 70, which, before amendment, vested title in the trustee to that property of the bankrupt

> ". . . which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him." [7]

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1. Wilson v. Wilson, 43 Minn. 398, 45 N. W. 710 (1890); American Nat. Bank v. Taylor, 112 Va. 1, 70 S. E. 534 (1911). Note also that some states have enacted statutes to the effect that in the absence of an express declaration to the contrary, two or more grantees shall take an estate in common. A minority of jurisdictions hold this statute applies to tenancies by entireties. 2 Tiffany, Real Property (3d ed. 1939) § 433 at 226.

2. *Id.* at 227, n. 76.

3. ". . . if an estate in fee be given to a man and his wife, they are neither properly joint tenants, nor tenants in common, for husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seised of the entirety, *per tout, et non per my:* the consequence of which is, that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor." 2 Bl. Comm. *182.

4. Swan v. Walden, 156 Cal. 195, 103 Pac. 931 (1909); *cf.* Koehring v. Bowman, 194 Ind. 433, 142 N. E. 117 (1924).

5. *Cf.* 2 Tiffany, *op. cit. supra* note 1, § 438 at 238.

6. At common law the husband and wife had other valuable rights, such as the right to take the rents and profits of the land during coverture. See 2 Tiffany, *op. cit. supra* note 1, § 435. For cases in which the death of one spouse followed within a short time after the bankruptcy of the other, see Kerin v. Palumbo, 60 F. (2d) 480 (C. C. A. 3d, 1932); Dioguardi v. Curran, 35 F. (2d) 431 (C. C. A. 4th, 1929).

7. 44 Stat. 243 (1926), 11 U. S. C. A. § 110 (a) (5) (1937).

In effect, this section made the law of the state the test of whether the bankrupt's property will pass to the trustee.[8] Since in those jurisdictions preserving tenancies by entireties it is universally held that a spouse cannot convey or assign the entireties property without the consent and co-operation of the other spouse, the first clause of the above section had little effect on this property.[9] But there is a wide divergence among the state courts as to whether a spouse's interest may be levied upon and sold under judicial process by his or her creditor. The minority jurisdictions hold that it may be[10] and in these states, of course, the second test of the section quoted would apply and the property passes to the trustee as an asset. But in the usual bankruptcy proceeding against husband or wife, the trustee is forced to ignore the bankrupt's interest in a tenancy by the entirety in the absence of state law allowing a spouse to convey the property or subject it to the demands of a creditor.[11]

a. *Where One Trustee Administers Both Estates*

By the law of most states where entrieties estates exist, they can be levied upon and sold by the joint creditors of husband and wife.[12] Several problems arise when husband and wife are adjudicated bankrupts. In the first place, the husband and wife cannot be joined in bankruptcy proceedings, voluntary or involuntary, merely because of their relationship as husband and wife.[13] Usually they are adjudicated in separate proceedings. It is possible, however, that for reasons of economy and convenience a single trustee will be appointed to administer both estates.[14] This is particularly likely when the petitions of both spouses are filed a short time apart.[15] The questions pertinent to this note are whether the entireties property should pass into the jurisdiction of the bankruptcy court when (1) both husband and wife are adjudicated bankrupts, or (2) where one trustee is appointed to administer both estates. No case has held that merely because of the coincidence of both husband's and wife's bankruptcy the entireties estate should pass as an asset to the bankruptcy court.[16] From a logical point of view, this appears to be an inevitable conclusion,

8. *In re* Landis, 41 F. (2d) 700 (C. C. A. 7th, 1930); Cullom v. Kearns, 8 F. (2d) 437 (C. C. A. 8th, 1925). 2 COLLIER, BANKRUPTCY (13th ed. 1923) 1672.

9. *In re* Zabawski, 283 Fed. 552, 556 (E. D. Mich. 1922); *In re* Berry, 247 Fed. 700 (E. D. Mich. 1917). Tiffany names Massachusetts as the only state which held that a husband retained his common-law right to divest the wife of the land after passage of the married women's acts. 2 TIFFANY, *op. cit. supra* note 1, § 233, n. 93.

10. Moore v. Denson, 167 Ark. 134, 268 S. W. 609 (1924), 9 MINN. L. REV. 683; Marcum v. Marcum, 177 Ky. 186, 197 S. W. 655 (1917); Buttlar v. Rosenblath, 42 N. J. Eq. 651, 9 Atl. 695 (1887); Hiles v. Fisher, 144 N. Y. 306, 39 N. E. 337 (1895); Ganoe v. Omhart, 121 Ore. 116, 254 Pac. 203 (1927). This was the common-law rule. 2 TIFFANY, *op. cit.* supra note 1, § 434. *Contra:* Hurd v. Hughes, 12 Del. Ch. 188, 109 Atl. 418 (1920); Jordan v. Reynolds, 105 Md. 288 (1907); Winchester-Simmons Co. v. Cutler, 199 N. C. 709, 155 S. E. 611 (1930), (1931) 29 MICH. L. REV. 788. See (1929) 8 TENN. L. REV. 60, which states that the latter cases constitute the minority rule.

11. Dioguardi v. Curran, 35 F. (2d) 431 (C. C. A. 4th, 1929); Armhold v. Lang, 11 F. (2d) 630 (E. D. Mo. 1926); Cullom v. Kearns, 8 F. (2d) 437 (C. C. A. 4th, 1925); *In re* Berry, 247 Fed. 700 (E. D. Mich. 1917) (contract of sale held by entireties); *In re* Beihl, 197 Fed. 870 (E. D. Pa. 1912). See Note (1936) 10 TEMP. L. Q. 180, 181.

12. Wharton v. Citizens' Bank, 223 Mo. App. 236, 15 S. W. (2d) 860 (1929). 2 TIFFANY, *op. cit. supra* note 1, at 231.

13. BRANDENBURG, BANKRUPTCY (4th ed. 1917) § 114; 1 REMINGTON, BANKRUPTCY (4th ed. 1934) §§ 46, 340. "Nothing less than an actual partnership will permit a joinder of parties defendant." *Ibid. Cf.* BLACK, BANKRUPTCY (4th ed. 1926) § 180.

14. 2 COLLIER, BANKRUPTCY (14th ed. 1940) 1648.

15. See, for example, *In re* Pennell, 15 F. Supp. 743 (W. D. Pa. 1935); *In re* Utz, 7 F. Supp. 612 (Md. 1934).

16. See cases cited in notes 11 *supra*, and 21 *infra*.

as the bankruptcy proceedings are separate and distinct[17] and the entireties estate is an indivisible one.[18] It seems that this should be equally so even where there are joint creditors.[19] Nor should the fact that one trustee has been appointed for both spouses' estates be an important factor.[20] Some courts, however, have held that where both husband and wife have been adjudicated bankrupts and their estates have been consolidated under the administration of one trustee, the property held by them as tenants by the entirety passes to the trustee under § 70 (a) (5) and may be sold for the benefit of creditors.[21] The rule is predicated on several theories. One line of cases holds that since the husband and wife together could have transferred the property before the filing of the petition, title can pass to their joint trustees.[22] Other cases contend that by § 47 (a) (2) of the Act of 1898, the trustee was vested with all the rights of a judgment creditor holding an execution unsatisfied[23] and where he acts as trustee for husband and wife he is to be considered a joint creditor of both spouses even though they have separate bankruptcy proceedings.[24] Giving strict effect to the nature of tenancies by entireties would seem to lead to a result contrary to that achieved in the above cases. But courts have abandoned strict logic to allow joint creditors to reach all of the assets of the bankrupts. Perhaps they are mindful of the possibility of husband and wife holding the bulk of their property by entireties, so that not only would the creditors receive little or nothing on their claims but the bankrupts would be little affected by the proceedings.[25] The remedies of the creditors who face this position will be discussed later.

17. 2 COLLIER, *op. cit. supra* note 14, at 1648. Since it is held that the entireties property cannot pass to either spouse's trustee in individual proceedings in many states, note 11 *supra*, it is difficult to see how it can be said to pass as an asset to either of the two estates when both husband and wife are bankrupt.

18. "There can be no partition of land held by the entirety, since this would imply a separate interest in each tenant, contrary to the underlying theory of the tenancy." 2 TIFFANY, *op. cit. supra* note 1, at 235.

19. *Cf.* (1934) 34 COL. L. REV. 762.

20. An analogy has been made to the situation where a single trustee has been appointed to administer the assets of several partners. It is pointed out that such a trustee is not able to reach firm assets. Dickey v. Thompson, 323 Mo. 107, 18 S. W. (2d) 388, 394 (1929), 8 TENN. L. REV. 60. "But partnership creditors may protect themselves by filing an involuntary petition against the firm, and so reach firm assets." (1929) 43 HARV. L. REV. 312, 313. *Cf.* (1934) 34 COL. L. REV. 762.

21. *In re* Pennell, 15 F. Supp. 743 (W. D. Pa. 1935); *In re* Utz, 7 F. Supp. 612 (Md. 1934); *In re* Carpenter, 5 F. Supp. 101 (M. D. Pa. 1933). *Cf. In re* Brown, 60 F. (2d) 269 (W. D. Ky. 1932), where the court held that a Kentucky statute changed entireties estates to tenancies in common.

22. *In re* Carpenter, 5 F. Supp. 101 (M. D. Pa. 1933). *Cf. In re* Pennell, 15 F. Supp. 743 (W. D. Pa. 1935).

23. ". . . and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied. . . ." 30 STAT. 557 (1898), as amended by 36 STAT. 842 (1910), 11 U. S. C. A. § 75. The Chandler Act shifted this language to the new § 70 (c), 52 STAT. 879 (1938), 11 U. S. C. A. § 110 (c) (Supp. 1940), which now reads "The trustee, as to all property in the possession or under the control of the bankrupt at the date of bankruptcy or otherwise coming into the possession of the bankruptcy court, shall be deemed vested as of the date of bankruptcy with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied, whether or not such creditor actually exists."

24. *In re* Utz, 7 F. Supp. 612 (Md. 1934). *Contra:* Dickey v. Thompson, 323 Mo. 107, 18 S. W. (2d) 388 (1929). The 1910 amendment giving the trustee a judgment creditor's rights was not enacted for the purpose for which it was employed by the court in the *Utz* case. 2 COLLIER, *op. cit. supra* note 14, at 1053 *et seq.*

25. See Phillips v. Krakower, 46 F. (2d) 764, 765 (C. C. A. 4th, 1931); First National Bank of Goodland v. Pothuisje, 25 N. E. (2d) 436, 440 (Ind. 1940), and the discussion of these cases *infra*.

It seems then that courts are increasingly liberal in permitting estates of the husband and wife to be consolidated under one trustee, and the tendency is to overlook the common-law indivisibility of the tenancy by the entirety in order that the creditor of both may not suffer by what is now being considered a common-law "technicality".[26] In the absence of cases on point, it is fruitless to speculate as to what will be held where either the adjudications of husband and wife are so separated as to prevent consolidation of the proceedings, or in a situation where the proceedings approximate each other but two individual trustees are appointed. It is worth noting, however, that when these cases arise, the decision of the courts will indicate to what extent the courts intend to abandon the classic concept of the estate.

b. *Where the Bankrupt Spouse Survives*

Another interesting situation arising under the Act of 1898 was presented in the case of In Re *Flynn*.[27] In that case the husband had been adjudicated a bankrupt but had not as yet been discharged, when his wife with whom he had held certain property by the entirety died. The issue was whether the property should pass to the trustee. In spite of precedent to the effect that the nature of property is to be determined as of the date of filing of the petition,[28] the court held that the trustee was like a lien creditor under the old § 47 (a) (2) and when the wife died the lien on the husband's interest was perfected, since the husband then owned the entire estate.[29] As a result the property was held to have passed to the trustee. The decision is surprising in that the court considered the husband's interest as a mere "expectancy",[30] so that prior to the wife's death the court argued the trustee had a lien on an expectancy.

Obviously the court was straining the language of the Act to reach an equitable result. The Chandler Act attempts to relieve courts of this burden in the above situation by providing in the new § 70 (a) (8)

> "All property in which the bankrupt has at the date of bankruptcy an estate or interest by the entirety and which within 6 months after bankruptcy becomes transferable in whole or in part solely by the bankrupt shall, to the extent that it becomes so transferable, vest in the trustee and his successor and successors, if any, upon his or their appointment and qualification, as of the date of bankruptcy. . . ." [31]

There is some question whether this section will be held to operate retroactively or whether it will be held to be valid at all.[32] Assuming its va-

26. See (1929) 43 HARV. L. REV. 312, 313.

27. 1 F. (2d) 566 (W. D. Pa. 1924).

28. So that property acquired after adjudication does not pass to the trustee. 4 REMINGTON, BANKRUPTCY (4th ed. 1935) § 1395, and cases cited therein. *Cf.* BLACK, *op. cit. supra* note 13, § 771.

29. "The husband's expectancy in the real estate in question was realized before the date of his discharge in bankruptcy, and while the trustee was vested with the lien of a judgment creditor against the premises in question." *In re* Flynn, 1 F. (2d) 566, 568 (W. D. Pa. 1924).

30. *Ibid.*

31. 52 STAT. 879 (1938), 11 U. S. C. A. § 110 (a) (8) (Supp. 1940).

32. ". . . it is the writer's opinion that where vested interests are involved it is not retroactive, but is applicable only to matters of procedure." Musgrave, *Effect of the Chandler Act Upon Estates by Entireties* (1938) A-2 CORP. REORG. & AM. BKCY. REV. 4, 5.

In an editor's note to the above article, it is stated: "The author has refrained, purposely perhaps, from discussing the question of constitutionality which may be in-

lidity, as a practical matter the new provision places a restraint on the alienation of the estate by the bankrupt within the six months specified in the act, and enlarges the possibilities of tenancies by entireties passing to the trustee in bankruptcy.[33] In some states the six months rule will place a further limitation on the spouse before bankruptcy. For example, before the Chandler Act, in states where a spouse could not subject the entireties estate to his or her individual debts, the spouse could obtain a certain amount of credit, as in the case of an expectancy, by borrowing on the possibility of receiving the whole estate on the death of the other spouse. By calculating the approximate time of the death of the other spouse, the borrowing spouse could jump into the bankruptcy courts immediately before the time, secure a discharge and on the subsequent death of the other tenant receive the whole estate free and clear of the claims of creditors. In establishing the six months rule the Chandler Act destroys the accuracy of the debtor's calculations and removes the possibilities of a possible "racket".

III. Rights and Remedies of Creditors

Where the entireties estate is given its full meaning, the rule is that the creditor of an individual spouse cannot reach property held by the entirety in those states in which the tenancy is given its peculiar effect.[34] Where the state has abolished this estate or where it has permitted levy and execution by the spouse's creditors, however, there is an available remedy. In most states a joint creditor can levy on the entireties property.[35] The application of these few rules becomes problematical in the event of bankruptcy. What is the effect of the bankruptcy of the individual spouse or both on the rights and remedies of the individual or joint creditor? And what are the consequences of a discharge?

In states where the "common-law" tenancies by entireties survive, the creditor who has a claim against one spouse is brought no closer to the jointly owned property by the debtor's bankruptcy, for, as has been pointed out, the property will not pass to the trustee unless the solvent spouse dies within the six months following the filing of the petition.[36] Since the debt is not *fully* discharged by the bankruptcy proceedings[37] and the entireties property is not administered as part of the bankrupt's estate, the cases generally allow the judgment creditor to attach the property should the debtor's spouse die after the six months following the petition. Although not expressed, apparently the courts feel that this is one remedy that should not be barred the creditor by discharge. And, under the new section 70 (a) (8) if such a death occurs within the six months the property will then pass to the trustee as of the date of the filing of the petition. So although the creditor is barred from reaching the property directly in this event, he will share in it indirectly by distribution in the bankruptcy court.

The Chandler Act provides that every lien obtained by judicial proceedings within four months of bankruptcy against property of the bankrupt, while he was insolvent, is null and void.[38] Under a similar pro-

volved in the subdivision of section 70 of the new act to which he refers. After-acquired property may not come under the authority of Congress in enacting bankruptcy legislation." *Ibid.*

33. *Ibid.* See Hanna and McLaughlin, The Bankruptcy Act of 1898 as Amended (1939) 78 n.

34. See divided cases in notes 10 and 11 *supra.*

35. Note 12 *supra.*

36. Note 31 *supra.*

37. 1 Collier, *op. cit. supra* note 14, at 1655.

38. 54 Stat. —, (1940), 11 U. S. C. A. § 107 (a) (1).

vision in the Act of 1898 it was held that a creditor of both husband and wife who had obtained a lien on the entireties property by his judgment or by execution within the four months, lost his lien even though the entireties property, like exempt property, did not pass to the trustee.[39] Where the bankruptcy of either obligor is not forseeable, the creditor can hardly escape this result.[40] But where the creditor knows or suspects the impending bankruptcy of either or both spouses, to reach the entireties property he has a choice of several procedures depending on the law of the state where the obligation is due. Where a judgment on the debt does not create a lien on the property of the debtor, the creditor should reduce his claim to judgment, but postpone execution on the entireties property until the petition in bankruptcy is filed.[41] Then he may levy on the property at any time during the bankruptcy or even after the discharge.[42] But, if by the state law a lien on the entireties property is created by the judgment itself, then to procure a lien on the entireties property, the creditor must refrain from reducing his claim to a judgment until the petition has been filed, and then it must be secured before either spouse obtains a discharge.[43] The object of the above procedure is to prevent the possibility of the trustee's setting aside the lien created by judicial proceedings within four months of the debtor's bankruptcy.[44] If such a lien has been obtained prior to the four months period, of course the above suggestions are unnecessary.

a. *Effect of Discharge of One Spouse or Both*

If the creditor of either spouse has not procured a judgment, a discharge of the debtors-spouse will, of course, bar subsequent judgment and

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39. *Cf.* 4 REMINGTON, *op. cit. supra* note 28, § 1877.

40. The joint creditor, however, still retains his right to go against the solvent spouse. In Molloy v. Molloy, 43 Ohio App. 49, 182 N. E. 660 (1930), the plaintiff sued on a promissory note executed by husband and wife. One of the defenses was that the husband had been given a discharge in bankruptcy. The court held that the plaintiff could recover from the wife under § 16 of the Bankruptcy Act, which provides: "The liability of a person who is a co-debtor with . . . a bankrupt shall not be altered by the discharge of such bankrupt." See also Dickherber v. Turnbull, 31 S. W. (2d) 234 (Mo. App. 1930). "But if the liability on the note of one spouse be discharged in bankruptcy, a judgment against the other cannot be collected out of the property during the lifetime of the first." Phillips v. Krakower, 46 F. (2d) 764, 765 (C. C. A. 4th, 1931).

41. Thus he will avoid having his lien by judicial proceedings set aside by virtue of § 67 (a) (1) of the Bankruptcy Act. See *infra*.

42. Kolakowski v. Cyman, 285 Mich. 585, 281 N. W. 332 (1938) (where creditor got judgment on joint note before husband's discharge and was permitted to levy on the property after both husband and wife had been discharged).

43. In Echelbarger v. Bank of Swayzee, 211 Ind. 199, 5 N. E. (2d) 966 (1937), the creditor obtained a judgment against the husband and wife after they had been adjudicated bankrupts, but *before* their discharge. The spouses were then discharged and brought this action to enjoin the creditor from enforcing the lien on the entireties property. The creditor's demurrer was sustained by the court. Docketed and recorded, the judgment became a lien on the land. But the court said: "Such a creditor may pursue his right to subject the property to his debt in the state courts while the bankruptcy proceeding is pending. . . . The discharge in bankruptcy releases the bankrupt from personal liability on the debt, but there is nothing in the Bankruptcy Act which discharges the land held by the entireties from the lien of a judgment." *Id.* at 203, 5 N. E. (2d) at 968. See also Wharton v. Citizens' Bank of Bosworth, 223 Mo. App. 736, 15 S. W. (2d) 860 (1929).

Note, too, that on the petition of a creditor in this situation, the court will postpone the discharge until the creditor has gotten judgment to establish a lien. Phillips v. Krakower, 46 F. (2d) 764 (C. C. A. 4th, 1931).

44. See, for example, *In re* Pennell, 15 F. Supp. 743 (W. D. Pa. 1935); Ades v. Caplan, 132 Md. 66, 103 Atl. 94 (1918).

execution on the entireties property.[45] Where the creditor is a judgment creditor before discharge, however, he will not be affected by the bankruptcy proceedings as far as the entireties property is concerned.[46] The discharge bears a more important effect where the creditor is a joint creditor of both spouses and either spouse is discharged in bankruptcy.

In the normal fact situation, the creditor holds a promissory note executed by the husband and wife in return for a loan generally given with an eye to the entireties property as security. Sometimes the note contains a confession of judgment. In the absence of bankruptcy proceedings the creditor could proceed on the confession to execution—or, if there be no confession—proceed to judgment and thereby be in a position to execute. When the bankruptcy of either husband or wife intervenes before judgment, the creditor may still sue on the note at any time before discharge.[47] He may even petition the bankruptcy court to stay the discharge until he has obtained his judgment, and the petition will usually be granted.[48] The procedure is important where a single spouse has been adjudicated a bankrupt, for in some states the validity of the creditor's execution on the entireties property subsequent to the discharge depends on whether or not he has secured a joint judgment against the husband and wife before the discharge was granted.[49] The theory of this rule, as in the case of the creditor of one bankrupt spouse who has failed to get a judgment before the discharge, is that the discharge bars the creditor from charging the personal liability of the bankrupt spouse. Failing this, there can be no joint judgment and therefore no execution on the entireties property.[50] Where a joint judgment precedes the discharge of the bankrupt the lien obtained thereby survives bankruptcy proceedings and the creditor may thereafter levy. The satisfaction of the creditor from property held by the entireties may be said to depend on his diligence in procuring a joint judgment before either spouse is discharged.[51]

Contrary to the general rule above stated, is the most recent case of *First National Bank of Goodland v. Pothuisje*.[52] In that case the obligee of a promissory note executed by both husband and wife was attempting to get a judgment and levy on property the spouses held by the entirety. The husband had been discharged prior to this suit, and the wife had been adjudicated a bankrupt but was not yet discharged. In the face of precedent to the effect that the discharge of one spouse bars a joint judgment against both, the court concluded that the creditor was entitled to judgment and levy on the entireties property. The court reasoned that

45. BLACK, *op. cit. supra* note 13, § 1176; 1 COLLIER, *op. cit. supra* note 14, at 1654.

46. Thus, if the other spouse dies the judgment creditor may levy on the land coming into the hands of the debtor spouse.

47. Notes 43 and 44 *supra*.

48. Note 43 *supra*. In granting the creditor this procedural remedy, the court in Phillips v. Krakower, 46 F. (2d) 764 (C. C. A. 4th, 1931) said: "The question . . . is whether . . . the court shall grant the discharge knowing that it will result in legal fraud, that is, the effectual withdrawing of the property from the reach of those entitled to subject it to their claims, for the technical ownership to pass to those who created the claims against it. We cannot conceive that any court would lend its aid to the accomplishment of a result so shocking to the conscience." *Id.* at 765.

49. Wharton v. Citizens' Bank, 223 Mo. App. 236, 15 S. W. (2d) 860 (1929). *Contra:* First National Bank of Goodland v. Pothuisje, 25 N. E. (2d) 436 (Ind. 1940); Edwards & Chamberlin Hardware Co. v. Pethick, 250 Mich. 315, 230 N. W. 186 (1930).

50. *But see* First National Bank of Goodland v. Pothuisje, 25 N. E. (2d) 436 (Ind. 1940), discussed *infra*. BLACK, *op. cit. supra* note 13, § 1179; BRANDENBURG, *op. cit. supra* note 13, § 1571; 1 COLLIER, *op. cit. supra* note 14, at 1533.

51. Wharton v. Citizens' Bank, 223 Mo. App. 236, 241, 15 S. W. (2d) 860, 862 (1929).

52. 25 N. E. (2d) 436 (Ind. 1940).

the contrary rule is founded on the theory that the note of a husband and wife is a joint and several obligation, and if a joint judgment is barred by the discharge of one, the tenancy by the entirety escapes execution. Expressly rejecting this idea of a joint and several obligation, the court went on to say,

> "Such an obligation is more than that (joint and several), it is also the liability of that separate and distinct legal entity which the law recognizes as arising from the unity of a man and wife occupying the marital relationship . . . when husband and wife join in executing a note there arises a triple liability . . . ." [53]

The court explains its "three dimensional obligation" theory [54] by hypothecating a situation where both spouses are adjudicated bankrupts in separate proceedings, neither listing the entireties property as an asset. After discharge the court supposes the creditor is without a remedy, unless it be said:

> "The bankruptcy court discharged only the joint and several liabilities aspect of the debt created by the husband and wife. It did not afford reilef to the bankrupts as that distinct liability assumed by them in the capacity of a separate entity; that liability, as distinguished from their personal liabilities, was as foreign to the protection of the court of bankruptcy as was their entireties property to its jurisdiction." [55]

No doubt the holding of this case results from the Indiana court's belief that the creditor was "remediless." But it is not distinguishable on this reason from other cases holding an opposite result. Other courts in the same factual situation presented by the *Goodland Bank* case have pointed out that the creditor could have started proceedings before the discharge was granted and even petitioned the bankruptcy court to stay the discharge until judgment was secured. There was nothing in the facts of the *Goodland Bank* case to show that the creditor did not have these remedies available. So other courts would have called the creditor negligent in failing to avail himself of the remedies possible before discharge. But the court in the *Goodland Bank* case did not deem these remedies sufficient. Possibly this is due to the fact that the petition to stay discharge may be granted or denied in the bankruptcy court's discretion. It is submitted that if the petition was denied even though diligently brought, the creditor would actually be "remediless" and in that situation the rule of the *Goodland Bank* case should be applied. But the fact that the Indiana court held as it did, even though the creditor had not been diligent, suggests that the real reason for the decision was not the balance of the equities of that particular case, but rather the effect of the prevailing rule. There is no question but that by holding a discharge of either spouse immunizes the entireties property from subsequent execution, the courts encourage the use of this device to foil the unwary cred-

53. *Id.* at 439. "However, the court's use of the fiction of 'three dimensional liability' in the case of a husband and wife joint obligation appears superfluous and may in other situations be made a basis of a decision where substantial justification is lacking." (1940) 53 HARV. L. REV. 1389, 1390.

54. First National Bank of Goodland v. Pothuisje, 25 N. E. (2d) 436, 439-440 (Ind. 1940).

55. *Ibid.*

itor. And it is entirely possible that the husband and wife might secure all their property in this fashion, thereby evading the moral obligation of the unpaid debt. This then, would be justification for the result of the *Goodland Bank* case. But there is as yet no proof that this reason will inspire other courts to hold likewise.

Conclusion

Ultimately the fate of tenancies by entireties in the bankruptcy court and the rights of creditors after debtors owning such property have sought the refuge of that court, rests on the law of the various states. The fact that an increasing number of states have broken down the unity doctrine of the marital relationship points to the probability that the tenancy by the entirety will eventually be made a divisible estate. It is unfortunate for bankruptcy purposes that this has not as yet been done in all states. It is still possible in too large a number of states for a man and wife to keep a large portion of their property from the administration of the bankruptcy court by holding it in this form. Even though this is in the face of the policy of the Bankruptcy Act to administer all of the debtor's assets, and though a number of creditors may be left with unsatisfied claims, state courts and legislatures still persist in preserving the indivisibility of this estate. There are two obvious solutions. One, to eliminate the entireties estate as a property law concept, the second, to enact special legislation to enable the property to pass to the trustee. While the second remedy suggested may not be in conformity with the desire for logical consistency needed by the law, nevertheless it would enable a state to preserve the estate for the conveniences of its property and inheritance laws and at the same time aid the administration of the bankruptcy court.

Aside from the problem of passing the title of the debtor to the trustee, there is the further question of the effect of a discharge on the rights of creditors which has not yet been satisfactorily determined by the state courts. This is but another argument for the elimination or modification of the entireties estate. As the law stands, the *Goodland Bank* case is almost alone in permitting the joint creditor to reach the property after the discharge of one or both of the spouses. The prevailing view not only prevents such creditor from sharing in the distribution of the estate in bankruptcy proceedings, but bars him from later proceedings after discharge, even though the entireties property did not come within the jurisdiction and control of the bankruptcy court. By setting up the rule that this property does come into the hands of the trustee, or at least the debtor's share in it, a more equitable result would be attained, and there would be no question as to the effect of the discharge in barring subsequent proceedings.

Since the preservation of the entireties estate is irreconcilable with the just and efficient administration of all the debtor's assets in bankruptcy, it seems inevitable that in the near future, at least for bankruptcy purposes, the peculiar features of the tenancy by the entirety must be cast

P. P. L. III.

Unproductive Trust Property and Principal, Income and Expense

I. General Background

Although problems of unproductive trust property have always been present, they were brought to the fore by the period of depressed prices during the thirties. Increasing use of the trust "tool" has also brought

more light to bear on the general subject. Although a historical background might be given, it would prove to be of slight beneficial value because the law has experienced rapid expansion within the past few years. Therefore, this paper will confine itself to defining terms and describing the fact situations involved.

Wherever there are successive beneficiaries of a trust, *e. g.* life tenant and remainderman, there is a duty placed upon the trustee to deal impartially with their interests.[1] So that where income is to be paid to a beneficiary for life and the principal is to be paid over to a second beneficiary upon the death of the former, the trustee has the duty of maintaining an equitable balance between the two divergent interests.[2] Upon the trustee is devolved the duty, therefore, of ascertaining what current receipts are to be treated as income and what as principal; and he must also consider the expenditures allocable to income and those to principal. Concepts of economists, accountants and finance experts as to principal, income and expense are only helpful in the easiest of situations.

a. Period During Which Income Is Earned

Usually current receipts are thought of as income.[3] But when they come in during a period only partly within the period of the trust, apportionment of them between income and principal may be necessary. Interest arising from obligations such as promissory notes [4] and bonds,[5] issued either by private corporations or governmental bodies,[6] are apportionable in this way. The underlying theory being that the interest accrues from day to day and it is therefore only just to apportion it as it accrues. On the other hand, rents from land,[7] interest on savings accounts,[8] and ordinary dividends from shares [9] are treated as falling due on a given day. An opposite result is reached in some jurisdictions by statutes concerning these periodic payments.[10] Where there are extraordinary dividends de-

1. Mississippi Valley Trust Co. v. Buder, 47 F. (2d) 507 (C. C. A. 8th, 1931); Redfield v. Critchley, 252 App. Div. 568, 300 N. Y. Supp. 305 (1st Dep't 1937); RESTATEMENT, TRUSTS (1935) § 183.

2. Redfield v. Critchley, 252 App. Div. 568, 300 N. Y. Supp. 305 (1st Dep't 1937); RESTATEMENT, TRUSTS (1935) § 232.

3. Gould v. Gould, 126 Misc. 54, 213 N. Y. Supp. 286 (Sup. Ct. 1925). Receipts which are profits made on the sale of capital are to be distinguished from a return on capital; the former are considered principal. Smith v. Hooper, 95 Md. 61, 51 Atl. 844, 54 Atl. 95 (1902); Stewart v. Phelps, 71 App. Div. 91, 75 N. Y. Supp. 526 (1st Dep't 1902).

4. Greene v. Huntington, 73 Conn. 106, 46 Atl. 883 (1900); Dexter v. Phillips, 121 Mass. 178 (1876); Moore v. Downey, 83 N. J. Eq. 428, 91 Atl. 116 (1914).

5. Bridgeport Trust Co. v. Maish, 87 Conn. 384, 87 Atl. 865 (1913); Wilmington Trust Co. v. Chapman, 20 Del. Ch. 67, 454, 171 Atl. 222, 180 Atl. 927 (1934); Wilson's Appeal, 108 Pa. 344 (1885).

6. Dexter v. Phillips, 121 Mass. 178 (1876), is authority for the proposition that interest on government bonds is not apportionable because a government cannot be forced to recognize its obligation. This view has been rejected. Wilson's Appeal, 108 Pa. 344 (1885). Dexter v. Phillips, 121 Mass. 178 (1876), is also authority for the view that interest due on coupon bonds was not apportionable. This view has also been generally rejected. See note 5 *supra*.

7. Greene v. Huntington, 73 Conn. 106, 46 Atl. 883 (1900); Dexter v. Phillips, 121 Mass. 178 (1876); Matter of Rosenstein, 152 Misc. 777, 274 N. Y. Supp. 126 (Surr. Ct. 1934).

8. Greene v. Huntington, 73 Conn. 106, 46 Atl. 883 (1900).

9. Mann v. Anderson, 106 Ga. 818, 32 S. E. 870 (1899); Ward v. Blake, 247 Mass. 430, 142 N. E. 52 (1924); *In re* Knox's Estate, 328 Pa. 177, 195 Atl. 28 (1937); Nirdlinger's Estate, 290 Pa. 457, 139 Atl. 200 (1927). *Contra:* Bankers Trust Co. of N. Y. v. Lobdell, 116 N. J. Eq. 363, 173 Atl. 918 (1934); Graves v. Graves, 115 N. J. Eq. 547, 171 Atl. 681 (1934).

10. 86 U. OF PA. L. REV. 681 (1938).

clared, they may take the form of cash or stock dividends. The jurisdictions are split rather widely on this point. Under the Pennsylvania rule the courts look to the source of the income and if the dividends arise out of earnings accruing during the trust period they are considered as income.[11] The Massachusetts rule looks to the form of the dividend, cash dividends being treated as income[12] and stock dividends as principal.[13] Between these two broad rules there are a number of minor variations.[14] Dividends on preferred shares are generally treated as income even though there may be an accumulation of passed dividends paid at one time.[15] Rights to subscribe to new shares, on the other hand, are treated everywhere as principal[16] with the exception of Pennsylvania.[17] Where a corporate body liquidates all or part of its holdings, the courts follow the same rules as they do in extraordinary stock dividend cases.[18] The rule applied in subscription rights is also used where shares are sold by the trustee[19] with Pennsylvania[20] consistently upholding its minority position. Terms of the trust instrument may change these rules of law[21] and the expression of intent by the testator as to how these receipts are to be treated is very important.

b. Type of Property Earning the Income

In addition to the problems of when the receipts are to be considered as due to the estate, there is a broad problem which arises due to

11. Evans v. Garvie, 23 Hawaii 651 (1917); Hagedron v. Arens, 106 N. J. Eq. 377, 150 Atl. 4 (1930); Stoke's Estate (No. 1), 240 Pa. 277, 87 Atl. 971 (1913); Earp's Appeal, 28 Pa. 368 (1857); Rhode Island Hospital Trust Co. v. Peckham, 42 R. I. 365, 107 Atl. 209 (1919).

12. Boardman v. Boardman, 78 Conn. 451, 62 Atl. 339 (1905); De Koven v. Alsop, 205 Ill. 309, 68 N. E. 930 (1903); Hemenway v. Hemenway, 181 Mass. 406, 63 N. E. 919 (1902).

13. Gibbons v. Mahon, 136 U. S. 549 (1890); De Koven v. Alsop, 205 Ill. 309, 68 N. E. 930 (1903); Minot v. Paine, 99 Mass. 101 (1868).

14. *See* Lightfoot v. Beard, 230 Ky. 488, 20 S. W. (2d) 90 (1929) (all extraordinary dividends are income); Oritz v. Fidelity-Philadelphia Trust Co., 18 Del. Ch. 439, 159 Atl. 376 (1931) (all extraordinary dividends are income); Rhode Island Hospital Trust Co. v. Peckham, 42 R. I. 365, 107 Atl. 209 (1919) (stock dividends principal but cash dividends apportionable); N. Y. PERS. PROP. LAWS § 17a (stock dividends principal).

15. Coolidge v. Grant, 251 Mass. 352, 146 N. E. 719 (1925); Crozer's Estate, 27 D. & C. 179 (Pa. 1936); *cf.* Given's Estate, 323 Pa. 456, 185 Atl. 778 (1936). *Contra:* Heyn v. Fidelity Trust Co., 174 Md. 639, 1 A. (2d) 83, 937 (1938).

16. De Koven v. Alsop, 205 Ill. 309, 68 N. E. 930 (1903); Chase v. Union Nat. Bk., 275 Mass. 503, 176 N. E. 508 (1931); Plainfield Trust Co. v. Bowlby, 107 N. J. Eq. 68, 151 Atl. 545 (1930); United States Trust Co. v. Heye, 224 N. Y. 242, 120 N. E. 645 (1918).

17. Holstetter's Trust, 319 Pa. 572, 181 Atl. 567 (1935); Waterhouse's Estate, 308 Pa. 422, 16 Atl. 295 (1932); Jones v. Integrity Trust Co., 292 Pa. 149, 140 Atl. 862 (1928). Pennsylvania also holds that rights to subscribe to shares of another corporation are apportionable. Eisner's Estate, 175 Pa. 143, 34 Atl. 577 (1896).

18. Following the Pennsylvania rule and holding the same to be apportionable: United States Trust Co. v. Heye, 224 N. Y. 242, 120 N. E. 645 (1918); McKeown's Estate, 263 Pa. 78, 106 Atl. 189 (1919); Estate of Matthews, 210 Wis. 109, 245 N. W. 122 (1932).

Following the Massachusetts rule and holding the same to be principal: Curtis v. Osborn, 74 Conn. 79, 49 Atl. 102 (1901); Powell v. Madison Safe Deposit & Trust Co., 208 Ind. 432, 196 N. E. 334 (1935); Anderson v. Bean, 272 Mass. 432, 172 N. E. 647 (1930).

19. The entire proceeds are considered principal. Long v. Rike, 50 F. (2d) 124 (C. C. A. 7th, 1931); Smith v. Hooper, 95 Md. 16, 21 Atl. 884 (1902); Berger v. Burnett, 97 N. J. Eq. 169, 127 Atl. 160 (1924). See also 76 U. OF PA. L. REV. 589 (1928).

20. Nirdlinger's Estate, 290 Pa. 457, 139 Atl. 200 (1927); Estate of Cassat, 105 Pa. Super. 14, 158 Atl. 586 (1932).

21. *In re* Fisher, 7 N. J. Misc. 1075, 148 Atl. 193 (Orph. Ct. 1929).

the type of property from which such payments are received. If a trustee purchases bonds at a premium he is permitted to amortize the premium payment out of interest received for the remainderman.[22] However, should bonds included in the trust at the time of its creation be selling at a premium, the trustee has no power and is under no duty to set aside a fund for amortization.[23] As to bonds purchased by the trustee at a discount, there is neither duty nor power in the trustee to pay over to the life tenant the increases in value as the bonds approach maturity;[24] nor to treat a part of the proceeds as income even when the bonds mature and are actually paid.[25] Where the trust estate includes at its creation bonds selling at a discount, the rule is exactly like that applied to premium bonds and the trustee has no power to pay the life tenant any more than the actual interest received.[26] Such property as mines, leaseholds, royalties, etc., which comes within the concept of wasting property presents another problem. Because of the nature of the property it is certain to depreciate through the passage of time, and it would be unfair to the remainderman to have all income from such property payable to the life tenant. The rule has evolved, therefore, that the trustee is under a duty to allocate a portion of the income to an amortization fund whenever such property is retained.[27] This is in direct contrast to the rules applicable to legal estates, *i. e.* where a life estate has been created in *A* with a remainder in *B*. There, real property laws control with the result that *A* may operate any open shafts and treat the entire proceeds as income,[28] but the proceeds from the operation of new shafts will be treated as being principal to be held for *B*.[29] Although the real property rule has led to a reluctance to recognize that a part of the proceeds of mines operated should be amortized,[30] there is a distinction in that the proceeds come into the trust estate rather than directly into the hands of one of the beneficiaries and this should be recognized. On the other side of the picture, buildings, which are treated as wasting property in the business world, are held not to come within the wasting property rules.[31] In fact, it is held that the trustee is under a duty to pay over all the income received to the

22. Curtis v. Osborn, 79 Conn. 555, 65 Atl. 968 (1907); Old Colony Trust Co. v. Comstock, 290 Mass. 377, 195 N. E. 389 (1935); Gould v. Gould, 126 Misc. 54, 213 N. Y. 286 (Sup. Ct. 1925); Trexler's Estate, 32 D. & C. 427 (Pa. 1938); RESTATEMENT, TRUSTS § 239. *Contra:* Hite's Devisees v. Hite's Exec., 93 Ky. 257, 20 S. W. 778 (1892); Penn-Gaskell's Estate (No. 2), 208 Pa. 346, 57 Atl. 715 (1904).

23. Higgins v. Beck, 116 Me. 127, 100 Atl. 553 (1917); Hemenway v. Hemenway, 134 Mass. 446 (1883); McLouth v. Hunt, 154 N. Y. 179, 48 N. E. 548 (1897).

24. Wood v. Davis, 168 Ga. 504, 148 S. E. 330 (1929); Old Colony Trust Co. v. Comstock, 290 Mass. 377, 195 N. E. 389 (1935); Matter of Gerry, 103 N. Y. 445, 9 N. E. 235 (1886).

25. Note 24 *supra*. See also 82 U. OF PA. L. REV. 182 (1933).

26. Note 23 *supra*.

27. Gay v. Focke, 291 Fed. 721 (C. C. A. 9th, 1923); Union County Trust Co. v. Gray, 110 N. J. Eq. 270, 159 Atl. 625 (1932); Gould v. Gould, 126 Misc. 54, 213 N. Y. Supp. 286 (Sup. Ct. 1925); Estate of Wells, 156 Wis. 294, 144 N. W. 174 (1914). *But cf.* Foster's Estate, 324 Pa. 39, 187 Atl. 399 (1936). See also Brigham, *Pennsylvania Rules Governing the Allocation of Receipts Derived by Trustees From Wasting Property* (1938) 86 U. OF PA. L. REV. 471.

28. Andrews v. Andrews, 31 Ind. App. 189, 67 N. E. 461 (1903); Blodgett's Estate, 254 Pa. 210, 98 Atl. 876 (1916).

29. Priddy v. Griffith, 150 Ill. 560, 37 N. E. 999 (1894); Blakely v. Marshall, 174 Pa. 425, 34 Atl. 564 (1896); Ammons v. Ammons, 50 W. Va. 390, 40 S. E. 490 (1901).

30. Ohio Oil Co. v. Doughetee, 240 Ill. 361, 88 N. E. 818 (1909); *In re* Rust's Estate, 213 Mich. 138, 182 N. W. 82 (1921); McFadden's Estate, 224 Pa. 443, 73 Atl. 927 (1909).

31. Evans v. Ockershausen, 100 F. (2d) 695 (App. D. C. 1938); Stevens v. Melcher, 152 N. Y. 551, 46 N. E. 965 (1897); Smith v. Keteltas, 62 App. Div. 174, 70 N. Y. Supp. 1065 (1st Dep't 1901).

life tenant without setting up a fund for depreciation or obsolescence.[32] There may well be a modification endorsed on this view where the trustee is operating a business and occupies a building which is part of the trust;[33] although this should be the result in the light of modern business accounting practice, it cannot be said to be the law.[34] It should be remembered that in this aspect of the problem, as well as in the one previously discussed, the terms of the trust insofar as they may disclose the settlor's intention are all important.

c. Period Within Which Expenses Are Incurred

Expenses must also be considered in the light of the time during which they accrue. Ordinarily, current expenses are allocable to the income account. But where expenses are incurred during a period which is only partly within the trust period and, like interest, accrue from day to day, such expenses should be charged to income and principal in the proportion in which they accrue before and during the trust period.[35] Taxes also raise such a problem for they may become due prior to the settlor's death for a period extending into the trust period. New York has held that in such a case the taxes are to be paid out of the principal.[36] Yet where the tax becomes due prior to the death of the life tenant and covers a period longer than that, the same jurisdiction has held that the expense should be apportioned,[37] as do the majority of jurisdictions.[38] It would seem that the expense of taxes in both situations should be divided between the income and principal accounts. Ordinary current expenses, as has been said, are chargeable to income. The Uniform Principal and Income Act[39] provides that taxes, insurance premiums, ordinary repairs, mortgage interest, trustee's commissions (except commissions computed on principal), court costs, and attorneys' and other fees on regular accountings shall be paid out of income. These provisions follow business accounting practices very closely and the only problem that would arise would be the determination of whether a repair falls into the category of ordinary or extraordinary repairs. In the same act it is

32. Estate of Edgar, 157 Misc. 10, 282 N. Y. Supp. 795 (Surr. Ct. 1935).

33. Matter of Jones, 103 N. Y. 621, 9 N. E. 493 (1886).

34. Matter of Chapman, 32 Misc. 187, 66 N. Y. Supp. 235 (Surr. Ct. 1900), *aff'd*, 167 N. Y. 619, 60 N. E. 1108 (1901); Estate of Matthews, 210 Wis. 109, 245 N. W. 122 (1932).

35. Matter of Rosenstein, 152 Misc. 777, 274 N. Y. Supp. 126 (Surr. Ct. 1934); *cf.* Welch v. Apthorp, 203 Mass. 249, 89 N. E. 432 (1909).

36. Estate of McKeogh, 158 Misc. 734, 286 N. Y. Supp. 862 (Surr. Ct. 1936); Matter of Gabler, 140 Misc. 581, 251 N. Y. Supp. 211 (Surr. Ct. 1931).

37. Matter of Hone, 152 Misc. 221, 274 N. Y. Supp. 101 (Surr. Ct. 1934); Matter of Schulz, 133 Misc. 168, 231 N. Y. Supp. 677 (Surr. Ct. 1928).

38. Crump's Estate, 13 Pa. C. C. 286 (1893); Rhode Island Hospital Trust Co. v. Harris, 20 R. I. 408, 39 Atl. 750 (1898). *Contra:* Cummins v. Cummins, 21 Hawaii 742 (1913); *cf.* Patterson v. Old Dominion Co., 149 Va. 597, 140 S. E. 810 (1928).

39. § 12. The cases support the stand taken by the Commissioners. Taxes and water rates: McDonald v. Fulton Trust Co., 64 F. (2d) 158 (App. D. C. 1933); Gould v. Gould, 126 Misc. 54, 213 N. Y. Supp. 286 (Sup. Ct. 1925). Insurance premiums: Holbrook v. Stoddard, 283 Mass. 495, 186 N. E. 565 (1933); Gould v. Gould, 126 Misc. 54, 213 N. Y. Supp. 286 (Sup. Ct. 1925). *Contra:* Commercial Trust Co. of N. J. v. Gould, 105 N. J. Eq. 727, 149 Atl. 590 (1930). Ordinary repairs: Rothschild v. Weinthel, 191 Ind. 85, 131 N. E. 917 (1921); Bridge v. Bridge, 146 Mass. 373, 15 N. E. 899 (1888); Gould v. Gould, 126 Misc. 54, 213 N. Y. Supp. 286 (Sup. Ct. 1925). Mortgage interest: Mulcahy v. Johnson, 80 Col. 499, 252 Pac. 816 (1927); Bridge v. Bridge, 146 Mass. 373, 15 N. E. 899 (1888). Trustee's Commissions: Commercial Trust Co. of N. J. v. Gould, 105 N. J. Eq. 727, 149 Atl. 590 (1930); McGuffey's Estate, 123 Pa. Super. 432, 187 Atl. 298 (1936); Estate of Wells, 156 Wis. 294, 144 N. W. 174 (1914).

provided that trustee's commissions computed on principal, the cost of investing the principal, attorney's fees and costs incurred in maintaining or defending any action to protect the property, and costs of improvements shall be charged to the principal account.[40] Here again, your problem deteriorates into determining whether or not the particular expense is one of those enumerated.

d. Type of Expense Incurred: Extraordinary Expenses

A branch of trust law overlapping and qualifying some of the above statements is one dealing with extraordinary expenses. However, the results achieved may be rationalized on the ground that these items do not fit within any of the categories mentioned. A pragmatic reason why such expenses should be payable out of principal is the fact that such a payment will reduce the income produced by reducing the producing principal and thus the expense is really borne by both life tenant and remainderman according to their respective interests. Thus, where you have a tax on capital gains, the tax is payable out of principal even though it is levied under the guise of an income tax.[41] Repairs are ordinarily payable out of income,[42] as we have seen. But where property must be put into a tenantable condition either at the creation of the trust [43] or upon acquisition of the property,[44] such cost is charged to principal. Cost of improvements is also borne by the principal account whether made voluntarily [45] or by reason of an assessment or tax [46] to provide the necessary funds therefor. This is true if the improvements are permanent in nature; if they are not, then the wasting asset principle should be applied and the cost apportioned through amortization.[47] Legal expenses incurred are properly charged to the account which was being protected.[48] Should such expenses arise out of an action in which both accounts are being protected, then both should bear the costs in proportion to the respective amounts involved.[49]

II. UNPRODUCTIVE PROPERTY:

a. Principal and Income Accounts

Unproductive property may be acquired by the trust estate through being present at its creation, by subsequent purchase or by productive property in the estate becoming unproductive. The intention of the settlor bears great weight on the question whether principal or income should

40. UNIFORM PRINCIPAL AND INCOME ACT § 12.

41. Holcombe v. Ginn, 296 Mass. 415, 6 N. E. (2d) 351 (1937); *cf.* Evans v. Ockershausen, 100 F. (2d) 695 (App. D. C. 1938).

42. Note 39 *supra.*

43. Sohier v. Eldredge, 103 Mass. 345 (1869); Greene v. Greene, 19 R. I. 619, 53 Atl. 1042 (1896).

44. Matter of Suydam, 138 Misc. 873, 248 N. Y. Supp. 176 (Surr. Ct. 1931).

45. Evans v. Ockershausen, 100 F. (2d) 695 (App. D. C. 1938); Morse v. O'Brien, 225 Mass. 345, 114 N. E. 363 (1916); Hudson County Nat. Bk. v. Woodruff, 122 N. J. Eq. 444, 194 Atl. 266 (1937); Smith v. Keteltas, 62 App. Div. 174, 70 N. Y. Supp. 1065 (1st Dep't 1901); Matter of Trimbey, 138 Misc. 662, 247 N. Y. Supp. 845 (1930).

46. Evans v. Ockershausen, 100 F. (2d) 695 (App. D. C. 1938); Peltz v. Learned, 70 App. Div. 312, 75 N. Y. Supp. 104 (3d Dep't 1902); Matter of Trimbey, 138 Misc. 662, 247 N. Y. Supp. 845 (Surr. Ct. 1930). *Contra:* Gould v. Gould, 126 Misc. 54, 213 N. Y. Supp. 286 (Sup. Ct. 1925) (compulsory improvements).

47. Matter of Adler, 164 Misc. 544, 299 N. Y. Supp. 542 (Surr. Ct. 1937).

48. Union & New Haven Trust Co. v. Koletsky, 117 Conn. 334, 167 Atl. 803 (1933); Rosenthal v. Lawyers County Trust Co., 156 Misc. 910; 282 N. Y. Supp. 868 (N. Y. City Ct. 1935).

49. Davidson's Estate, 287 Pa. 354, 135 Atl. 130 (1926).

bear the expense of such property. Where the trustee is directed in the trust instrument to sell unproductive property, the holding has been that expenses were payable out of principal.[50] Such a direction operates as an equitable conversion [51] and postponement of the sale is no justification to charge the expenses to income.[52] If the direction is to retain the property even though unproductive, the deduction is that the settlor intended that the carrying charges of such property be payable by the income.[53] Intention as expressed by the settlor and as interpreted by the courts may thus swing the balance either way. But if the settlor expressed no intention as to the sale or retention of unproductive property, such property should be sold and the proceeds invested in productive property; any expenses incurred before sale being properly payable out of principal.[54] A minority view holds that the expenses should be borne by the income unless there is an equitable conversion which is held to take place only if the settlor expressed the intention that the unproductive property should be sold.[55] A further variation of the latter rule seems to have been worked out by New York to the effect that if it appears the settlor would have contemplated a sale under all the circumstances, then the expenses are chargeable to principal.[56] New York has also held that if a sale was directed, the mere fact that a postponement of the sale was authorized will not relieve the principal of the attendant expenses.[57] Property which has become unproductive raises other considerations; it is generally held unfair to put the life tenant under a burden of expenses from property that gives no income in such a case.[58] Although the great majority of cases dealing with this subject concern land, the principles stated are applicable to all types of property.[59]

b. Apportionment of Proceeds

After a sale of unproductive land has transpired, the further problem of the allocation of proceeds realized arises. The amount to be distributed is determined by taking the sale price, adding all income that may have been received and deducting all charges and expenses as is done in business accounting. In the words of the Restatement of Trusts: [60] "The net proceeds received from the sale of the property are apportioned by ascertaining the sum which with interest thereon at the current rate of return on trust investments from the day when the duty to sell arose to the day of the sale would equal the net proceeds; and the sum so ascertained is to be treated as principal, and the residue of the net proceeds as income." Com-

50. Matter of Walker, 138 Misc. 879, 247 N. Y. Supp. 534 (Surr. Ct. 1930).
51. See 1 SCOTT, LAW OF TRUSTS (1939) § 131.
52. Furness v. Cruikshank, 230 N. Y. 495, 130 N. E. 625 (1921).
53. Matter of Satterwhite, 262 N. Y. 339, 186 N. E. 857 (1933).
54. Equitable Trust Co. v. Kent, 11 Del. Ch. 334, 101 Atl. 875 (1917); Rhode Island Hospital Trust Co. v. Tucker, 52 R. I. 277, 160 Atl. 465 (1932).
55. Creed v. Connelly, 272 Mass. 241, 172 N. E. 106 (1930), 40 YALE L. J. 275; Matter of Satterwhite, 262 N. Y. 339, 186 N. E. 857 (1933); Matter of McKeogh, 158 Misc. 734, 286 N. Y. Supp. 862 (Surr. Ct. 1936); *cf.* Love v. Engelke, 368 Ill. 342, 14 N. E. (2d) 288 (1938).
56. Matter of Jackson, 258 N. Y. 281, 179 N. E. 496 (1932), 80 U. OF PA. L. REV. 987.
57. Furniss v. Cruikshank, 230 N. Y. 495, 130 N. E. 625 (1921).
58. Hudson County Nat. Bk. v. Woodruff, 122 N. J. Eq. 444, 194 Atl. 266 (1937); Matter of Rowland, 273 N. Y. 100, 6 N. E. (2d) 393 (1937); Nirdlinger's Estate, 331 Pa. 135, 200 Atl. 656 (1938); RESTATEMENT, TRUSTS (1935) § 233, comment *m*.
59. Rhode Island Trust Co. v. Tucker, 52 R. I. 277, 160 Atl. 465 (1932) (securities); Matter of Clarke, 166 Misc. 807, 3 N. Y. S. (2d) 60 (Surr. Ct. 1938) (chattels); *cf.* RESTATEMENT, TRUSTS (1935) § 241.
60. § 241 (2).

plicated as the rule may sound when viewed as a verbal picture, reduction of the verbiage to symbols [61] makes the computation of the amounts a simple matter. In apportioning the proceeds, an equitable distribution is achieved since any loss or gain occasioned has been for the benefit of both the tenant and the remainderman and should be divided between the two. An alternative method would be to estimate the value of the unproductive property immediately and allow the life tenant an income on that basis.[62] This would permit him to enjoy a return at once, but is subject to the objection that the valuation placed would probably be anything but accurate. This course has been rejected as a method of dealing with trust estates and does seem less sound than the policy advocated by the Restatement.

Although Pennsylvania seemingly adopted the rule of the Restatement in the case of *Nirdlinger's Estate*,[63] the matter cannot be so lightly dismissed for in *Spear's Estate*,[64] apportionment was refused because of the practical difficulties invloved and because a result nullifying the settlor's intent would otherwise be reached. In *Levy's Estate*,[65] the *Nirdlinger* case was distingiushed on its facts, and it was held that the question of apportionment of carrying charges is to be determined by the equities of the parties entitled to the proceeds. Thus, the matter is open to much speculation as to the conclusiveness of the *Nirdlinger* holding although it is to be hoped that it will be generally followed.

The methods heretofore advanced are applicable to property becoming unproductive subsequent to the creation of the trust as well as to property unproductive when the trust is created. An interesting problem common to both of these latter situations is where the property undergoes two periods of unproductivity. This will occur when a mortgage is foreclosed and the property bought up by the trustee after which the property produces no income for a period and is then sold. The Restatement rule is applied in this case also. There is, however, another theory in use [66] whereby the ratio employed is principal to income in the amount that principal due on the mortgage bears to interest due. The two methods will arrive at the same monetary result only if the mortgage interest rate [67] and the rate of return on the trust coincides. But if the mortgage rate is higher, the life tenant will get a larger proportion under this method than under that of the Restatement. An unfortunate limitation upon apportionment theories has crept into the Uniform Principal and Income

61. Thus, have x equal the permanent principal, a the period of years for which the beneficiary is entitled to income, b the current rate of return on trust investments, and c the net proceeds of the sale. The resulting formula is $x + abx = c$ or $x = \frac{c}{1 + ab}$ which is a relatively easy formula to apply.

62. This method was rejected in Matter of Winthrop, 168 Misc. 861, 6 N. Y. S. (2d) 539 (Surr. Ct. 1938).

63. 331 Pa. 135, 200 Atl. 656 (1938).

64. 333 Pa. 199, 3 A. (2d) 789 (1939).

65. 333 Pa. 440, 5 A. (2d) 98 (1939).

66. Hudson County Nat. Bk. v. Woodruff, 122 N. J. Eq. 444, 194 Atl. 266 (1937); Skinner v. Boyd, 98 N. J. Eq. 55, 130 Atl. 22 (1925); Matter of Otis, 276 N. Y. 101, 11 N. E. (2d) 556 (1937); Matter of Pelcyger, 157 Misc. 913, 285 N. Y. Supp. 723 (Surr. Ct. 1936). See also Bailey and Rice, *The Duties of a Trustee with Respect to Defaulted Mortgage Investments* (1935-6) 84 U. OF PA. L. REV. 157, 327, 625.

67. In this connection, it should be noted that the cases cited in note 63 *supra* allow the mortgage interest rate under this theory even after the property is bought in.

Act.[68] It is there provided that the life tenant is not to receive any part of the proceeds as delayed income unless the net proceeds exceed the value of the property at the time it was acquired by the trustee. This provision unfortunately puts a burden on the life tenant since he must bear the brunt of any loss. What has been said concerning intention of the settlor is, of course, applicable to the problem of whether or not there should be an apportionment.

CONCLUSION

This problem of intention is one that arises in many fields of law and it may be resolved into the form of a simple question. Should courts of law lay down dogmatic rules as to certain fact situations and thereafter be governed thereby (Restatement view) or should they attempt to survey the surrounding circumstances and deduce the settlor's intention from them (New York view)? Although it might seem that there would be a safeguard if the courts were to determine the intention after the fact, this determination is really nothing more than a holding of what the individual judges themselves would do under like facts. It is all the more reprehensible when availed of in a field such as trusts where the settlor must, before he can even create a trust, confer with a lawyer who presumably should be able to point out the dogmatic rules laid down by courts and thus direct the intention of the settlor into legally binding verbiage. An important factor to be remembered is the well-founded belief that the primary object of the settlor's bounty is, in most cases the life tenant. Although this factor has definitely played a very important part in the formation of the rules as to apportionment, it cannot be said to have been over-weighted by the court. This point plus language of the courts concerning intent are of primary importance in the decisional law. It might not be amiss to point out that the Restatement of Trusts is playing a major role in molding a uniform law in this field. In the future, those conflicts that remain will be on points for which much can be said on either side; the forty-eight states may not march abreast but they will present a fairly compact body. *C. C. H.*

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68. § 11.